

# Judicial Ethos and the Autonomy of Law

Paul W. Kahn\*

Eugene Garver's *For the Sake of Argument* is a tremendously interesting book on one of the most important topics in jurisprudence today.<sup>1</sup> This topic used to be called the "autonomy of law." Today, the issue is better put as understanding the rational character of law. If we can no longer speak of law as a science, what is it that distinguishes the reasoning of law from other forms of political reasoning? Especially interesting is the way in which Garver analyzes a situation familiar to those of us who practice law: the experience, on the presentation of equally plausible arguments from opposing sides, of equipoise that gives way to decision, followed by a sense of necessity. The problem is to understand this movement from legitimacy to justice in a way that does not undermine the autonomy of law by appealing to interests, subjectivity, or politics. Garver argues that, during this mysterious middle moment of decision, logic may give out but reasonable argument is not exhausted.

Modern jurisprudence began with the simple claim that the autonomy of law derived from the unity of the source of law: the will of the sovereign.<sup>2</sup> That law was the will of the sovereign seemed clear to those who focused on the character of its enforcement: the coercive power of the sovereign will be applied to punish and correct violations.<sup>3</sup> But this view was soon supplemented by another: the autonomy of the law lies not in its origin, but in its content.<sup>4</sup> Legal autonomy points to the

---

\* Robert W. Winner Professor of Law and the Humanities and Director of the Orville H. Schell, Jr. Center for International Human Rights, Yale Law School. Thanks to Adam Romero for excellent research assistance.

1. EUGENE GARVER, *FOR THE SAKE OF ARGUMENT: PRACTICAL REASONING, CHARACTER, AND THE ETHICS OF BELIEF* (2004).

2. *E.g.*, JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE* (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832).

3. *E.g.*, Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

4. *E.g.*, THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* (Lawbook Exchange 1998) (1868). Cooley's work in constitutional law is a precursor for

closed character of a system of legal reasoning. For every legal question, legal science could produce a single, correct answer. Experts in the field would agree on the answer because they would reason in an identical manner from common sources.

These two competing ideas on the sources of the autonomy of the legal order—sovereign will or rational science—were both subject to devastating attack by the legal realists who argued that claims for a deductive science of law are “transcendental nonsense,”<sup>5</sup> and that the unitary sovereign is really nothing more than a competition among interest groups.

If there is no unity to law, however, what distinguishes law from politics? For much of the twentieth century, the answer was “nothing.” Law was understood as “politics continued by other means.”<sup>6</sup> If politics is an art of compromise, then law was an art of “balancing.”<sup>7</sup> Of course, that does not mean that nothing useful, normative, or true could be said about politics or about that particular form of politics that is law. A just politics has as its end the material well-being of its members; it supports their individual participation in a project of community self-determination and protects their personal liberties.<sup>8</sup> Different theories were elaborated as to the correct measure of politics—utility or justice, for example—and different views were offered as to how courts could contribute to these ends.<sup>9</sup> Nevertheless, a theory of law had to find itself in this political world. Some theories made law an adjunct to the political process (“policing the process of representation”),<sup>10</sup> some an adjunct to administrative rationality (“legal process”),<sup>11</sup> and some to utility maximization (“law and economics”).<sup>12</sup> Still others tied law to

---

the work on the common law of Christopher Langdell and his followers at Harvard Law School. See GRANT GILMORE, *THE AGES OF AMERICAN LAW* 42 (1977).

5. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 842 (1935).

6. See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986).

7. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 948-49 (1987).

8. This idea of justice provides the foundation of human rights law.

9. E.g., RONALD M. DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996); Frank I. Michelman, *The Supreme Court, 1968 Term—Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Richard Posner, *Wealth Maximization and Judicial Decision-Making*, 4 INT'L REV. L. ECON. 131 (1984).

10. E.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

11. E.g., HENRY HART & ALBERT SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994) (1958).

12. E.g., GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC*

ideas of Rawlsian justice<sup>13</sup> or Pocockian republicanism.<sup>14</sup>

By the last quarter of the century, however, many were wondering what happened to the autonomy of law. Something had gone wrong with theory, for it did not seem to capture very well the character of our practice and belief in the rule of law. Those who live a life immersed in the law believe that they are working within an autonomous domain of reasoning. They feel that they are constrained by law and working to establish the truth of the law. They define themselves by distinguishing their practice from that of politics, believing that their decisions are not simply an expression of their personal preferences. They understand law as deeply normative, but it is not the same as morality. They also believe that law's rule embodies and reflects the character of our polity, but it is not merely a product of political factions or of a balancing of interests among those factions.<sup>15</sup>

As a consequence of this reexamination, there were shifts in the character of legal scholarship. A new focus on doctrinal work appeared. Scholars were concerned with canons of interpretation, with textualism and intratextualism, with precedents rather than with high theory.<sup>16</sup> Without a good theory of law's autonomy, there is a natural inclination to act out that autonomy by turning to doctrine narrowly conceived.

Simultaneously with the turn to doctrinal analysis appeared a new interest in narrative.<sup>17</sup> Understanding the autonomy of law required theorizing an experience that lies between the domain of formal rationality, on the one hand, and individual or group preferences, on the other—that is, between logic and politics. Narrative seems to occupy just this middle range. Narrative does not reject the demands of formal reason, but it recognizes that logic alone will not get us very far. Neither is narrative simply an expression of personal interest. Community and

---

ANALYSIS (1970).

13. *E.g.*, DAVID A.J. RICHARDS, *TOLERATION AND THE CONSTITUTION* (1986).

14. *E.g.*, Cass Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1651 (1988); Cass Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29 (1985).

15. *See generally* PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* (1999); PAUL W. KAHN, *THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA* (1997).

16. *E.g.*, Akhil Reed Amar, *Intratextualism*, 112 *HARV. L. REV.* 747 (1999); Akhil Reed Amar, *The Supreme Court, 1999 Term—Forward: The Document and the Doctrine*, 114 *HARV. L. REV.* 26 (2000); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 *HARV. L. REV.* 1189 (1987); Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Forward: Implementing the Constitution*, 111 *HARV. L. REV.* 54 (1997); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 *U. CHI. L. REV.* 1175 (1989).

17. *E.g.*, PETER BROOKS & PAUL GEWIRTZ, *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* (1996); Robert M. Cover, *The Supreme Court, 1982 Term—Forward: Nomos and Narrative*, 97 *HARV. L. REV.* 4 (1983).

narrative are always mutually constitutive. A community's narrative offers the common ground that supports the possibility of disagreement within a single, on-going project. If law is constitutive of community, then it must be embedded in narrative. As Robert Cover said, there is no *nomos* without narrative.<sup>18</sup> That narrative is built out of and supports what Garver calls "common knowledge": a common history, a common set of commitments and paradigms from which and by which we reason.<sup>19</sup>

The idea of narrative generated three different approaches. First, there were those who took literally the idea of story-telling, trying to add their stories to the corpus of American legal rhetoric.<sup>20</sup> Second, there were those who tried to elaborate, from within the law, the public values sustained in this communal narrative.<sup>21</sup> Third, there were those who tried to theorize law's need for narrative.<sup>22</sup> This form of legal theory had to look less like philosophy and more like cultural anthropology. At issue was the interpretation of a practice. Theory had to stick close to facts, shunning too much abstraction toward justice or efficiency.

The most important figure in this third category was Ronald Dworkin.<sup>23</sup> Despite its Aristotelian frame, Garver's jurisprudential project sits very close to that of Dworkin. Much of what Garver has to say about authority, for example, reminded me of Dworkin's metaphor of the "chain novel": it is a matter of reasoning with, rather than complying.<sup>24</sup> For both, integrity is central to decision-making. Dworkin too uses the idea of integrity to describe this middle domain as one in which character is as important as logic.<sup>25</sup> He agrees with Garver that the character that matters to law is principled, not interested; it is built within the legal arguments offered, rather than brought to the controversy. Both understand that integrity is demonstrated by the

---

18. Cover, *supra* note 17, at 5.

19. See GARVER, *supra* note 1, at 37-43.

20. E.g., PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* (1991); PATRICIA J. WILLIAMS, *THE ROOSTER'S EGG: ON THE PERSISTENCE OF PREJUDICE* (1995).

21. E.g., CAROL J. GREENHOUSE ET AL., *LAW AND COMMUNITY IN THREE AMERICAN TOWNS* (1994); Cover, *supra* note 17; Austin Sarat, *Narrative Strategy and Death Penalty Advocacy*, 31 HARV. C.R.-C.L. L. REV. 353 (1996).

22. E.g., RONALD DWORKIN, *LAW'S EMPIRE* (1986).

23. See, e.g., *id.*; DWORKIN, *FREEDOM'S LAW*, *supra* note 9.

24. Compare DWORKIN, *LAW'S EMPIRE*, *supra* note 22, at 225-38 (comparing the task of the judge to that of an author attempting to contribute a chapter to a chain novel) and DWORKIN, *FREEDOM'S LAW*, *supra* note 9, at 10 (arguing that authority is drawn from the interpretation of past acts of popular will as expressions of consent to rule under moral principles) with GARVER, *supra* note 1, at 109-131 (arguing the Court creates authority through argument premised on and constituted by symbols, ethics, and authorities shared among the community).

25. DWORKIN, *LAW'S EMPIRE*, *supra* note 22, at 164-67.

construction of an ethos and that legal argument is central to this project.

If we ask what makes ethos so important to legal argument, I think the answer has much to do with what we might call the circumstances of adjudication or of legality more broadly. Legal argument takes place in a situation that simultaneously offers too little and too much. To fully pursue the normative issues at stake in any constitutional case of moderate complexity would be the effort of a lifetime. Consider, for example, the moral philosophy surrounding the issues of abortion or gay rights, or the issues generated by the tension between equality and liberty, or of free speech and silencing. The Court confronts these issues under the relentless pressure of the docket. Justices cannot argue to a conclusion: they vote, they compromise, they do their best to articulate a position that can hold together diverse views, and then they move on to the next case. Bickel famously praised the Justices for exercising the virtues of the academic,<sup>26</sup> but the actual Justices are far too busy to meaningfully exercise these virtues. Their work is not moral philosophy—not by a long shot. If we are to trust them, it must be because we trust the character they bring to bear on these issues. We understand that character, however, not because we have access to them personally, but because we see the reasons they offer to justify what they have done.

Just as circumstances constrain, resources overwhelm. There are always an indefinite number of ways to reach a conclusion or to reach a contrary conclusion. There are no “givens” in the law, no necessary starting points. Who would have thought that we could reach a conclusion about racial equality by starting from the Commerce Clause?<sup>27</sup> Reasoning is analogical, which means that the movement from one point to another is unpredictable in advance. It only becomes clear once the analogy or distinction is drawn.<sup>28</sup> Logic is not going to tell us how to build a convincing argument when neither the premises nor the forms of reasoning are determined in advance. The judicial opinion is necessarily a performance and an improv performance at that. Again, we learn whether the Justice has integrity by asking whether he has managed to take us in by this act of legal bricolage. We want, however, not just to be enthralled, but also to be enthralled for the right reasons. In the end, we ask of the Court whether it has made us better; has it treated us as the

---

26. BICKEL, *supra* note 6, at 25-26.

27. *See Katzenbach v. McClung*, 379 U.S. 294, 304 (1964) (ruling federal prohibition of racial discrimination in restaurants within Congress’s Commerce Clause power); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 286 (1964) (public accommodations).

28. EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 1-4 (1949); *see also* KAHN, *THE CULTURAL STUDY OF LAW*, *supra* note 15, at 71-72.

kind of people we believe we should be? A successful judicial opinion, for this reason, cannot be other than principled.

Both Garver and Dworkin see that what is at stake in such an argumentative context is character, and the virtue that we seek is “integrity.” Thus, Dworkin gives us the memorable figure of Hercules, who reflects the whole of the legal order in the integrated character of his own commitment to principles.<sup>29</sup> For both Garver and Dworkin, legal autonomy is a matter of ethos. Ethos is not adequately captured in either the idea of reason or that of will. It lies in character, which is always a matter of principles embedded in the will.

If Dworkin’s work set us on the trail of integrity twenty years ago, then Garver reminds us that if our object is to understand the role of character in argument, we might do well to return to our first and best source on this topic: Aristotle’s *Rhetoric*. I fear that this is a strategy that might fall on deaf ears in much of the legal community. Regardless, because the virtue of integrity—its simultaneous relationship to character and to argument—was never adequately worked out by Dworkin, we can use all the help we can get.

Still, there is a common criticism of Dworkin that I fear may apply with equal force to Garver’s work. That criticism of Dworkin is that he knows only four cases. With Garver’s book, I sometimes worried that he seemed to know only one. Of course, if you are going to pick one case, an excellent choice is certainly *Brown v. Board of Education*.<sup>30</sup> Nonetheless, I fear Garver asks this case to bear more weight than it can. *Brown* is a great case, but a terrible opinion. If this opinion is a display of judicial integrity, something seems to have gone wrong.

*Brown* works through a kind of bait and switch strategy. It purports to decide only a single issue: the constitutionality of the application of the separate but equal doctrine to the nation’s public schools. It relies upon a claim about the conditions of democratic self-government—citizens cannot fully participate in the political or civic life of the modern nation without an adequate education—and the findings of contemporary social science—segregation is detrimental to the education of minority students. *Brown* concludes that it is both irrational as a matter of public policy and damaging to individuals to continue to segregate the public schools.<sup>31</sup>

That something more may have been afoot was suggested in *Brown*’s companion case, *Bolling v. Sharpe*.<sup>32</sup> In *Bolling*, the Court

---

29. See DWORKIN, *LAW’S EMPIRE*, *supra* note 22, at 380.

30. 347 U.S. 483 (1954).

31. *Id.* at 493-95.

32. 347 U.S. 497 (1954).

confronted the problem of an absence of constitutional text putting a similar obligation of equality upon the federal government. The critical line of that opinion—a line that Garver does not emphasize, although it seems to support his reading—is that in which the Court pronounces it “unthinkable” that the federal government could continue to discriminate when and where the states could not.<sup>33</sup> Of course, from a historical, structural, and textual point of view it is not unthinkable at all. Two generations later, the Court briefly allowed the federal government to discriminate in the context of affirmative action while prohibiting the states from doing so.<sup>34</sup> However, if the basis of *Brown* is a moral principle of equality, rather than education policy or social science, then indeed it is “unthinkable.” That principle, not policy, is at issue became clearer in the years following the *Bolling* decision as the Court struck down every application of the “separate but equal doctrine.”<sup>35</sup>

For Garver, this is a demonstration of argumentative ethos; of the Court taking responsibility for a decision by showing itself to be of a certain character, building trust in that character through the arguments it offers (and fails to offer), and moving beyond what the more formal tools of reason alone could have offered. I cannot quite see it this way. Indeed, if Garver’s general view of the need for ethos is correct, the inadequacy of *Brown* may tell us something important about the ultimate collapse of the Second Reconstruction Movement.

Garver suggests that Chief Justice Warren was right in turning to the tools of politics in place of the traditional tools of law. The Court made a tough decision and then spent ten years exercising tactical judgments about how far to push—putting off miscegenation laws until the end—and how much to demand—allowing resistance and delays at the remedy stage. While it may have been exercising tactical political judgments over this period, it was not saying very much. For the most part, the Court offered no reason beyond a mute citation to *Brown* itself. As Justice Scalia has warned, however, those that live by the *ipse dixit*,

---

33. *Id.* at 500 (“In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.”).

34. *Compare* *Metro Broad. v. FCC*, 497 U.S. 547, 563-66 (1990) (applying intermediate scrutiny to federal affirmative action programs) and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 487-91 (1989) (applying strict scrutiny to state and local affirmative action plans but suggesting that federal plans might be evaluated more leniently) with *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995) (applying strict scrutiny to federal affirmative action plans and overruling *Metro Broadcasting*).

35. *See* *New Orleans City Park Improvement Ass’n v. Detiege*, 358 U.S. 54 (1958) (per curiam) (invalidating segregation in municipal parks and golf course); *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam) (city buses); *Holmes v. Atlanta*, 350 U.S. 879 (1955) (per curiam) (municipal golf course); *Mayor & City Council of Baltimore City v. Dawson*, 350 U.S. 877 (1955) (per curiam) (public bathhouses and beaches).

die by it.<sup>36</sup> We can disagree with the principle, but disagreement does not necessarily detract from institutional respect—as Roosevelt later learned. *Roe v. Wade* is immensely controversial and has plenty of its own problems, but at least there is the clear articulation of a principle: constitutional liberty includes the right to choose whether or not to have an abortion.<sup>37</sup> Having spoken a constitutional truth into existence, the principle proves to be remarkably enduring, even in the face of political opposition.<sup>38</sup>

This failure to set forth the principle at the heart of *Brown* has plagued the Court and the nation for more than a generation. Is it the anti-discrimination principle or the anti-subordination principle that stands behind the cases?<sup>39</sup> Is the end color blindness or the elimination of caste? Knowing which principle was at issue would have made a huge difference to the definition of the moral core of the nation and thus to understanding which policies were constitutionally suspect. Without this clarity, it became possible for the Court to engage in substantial dissembling when it began the long process of retreat from a commitment to equality in the 1970's.

When the Court finally made clear a principle, in *Washington v. Davis*, it did so without much attention, as if this were just a side issue to an evidentiary debate.<sup>40</sup> But institutions have integrity when they convince us they are focused on the right issues, when they demand that we look where they look and provide us a moral compass we feel we can trust. The silence of the Court both in *Brown* and afterward was no act of political friendship. It did not create a community; it set the conditions for fracture. It invited a legal process of tactical advance and feint and obscured a clear vision of the problem of race in America. The Court has managed to take us full circle. Today, we have schools that give every appearance of segregation by race, and that produce students who are substantially unequal in their abilities to realize those virtues of citizenship so praised in *Brown*. Yet, these “unequal” schools present no

---

36. *Morrison v. Olson*, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting). *Ipse dixit* is latin for “he himself said it” and is something asserted but not proven. BLACK'S LAW DICTIONARY 833 (7th ed. 1999).

37. 410 U.S. 113 (1973).

38. *See, e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833, 867 (1992) (reaffirming *Roe*'s essential holding that the Constitution protects a woman's right to choose to abort (“[T]o overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.”)).

39. *Compare, e.g.*, OWEN M. FISS, *Groups and the Equal Protection Clause*, in EQUALITY AND PREFERENTIAL TREATMENT 84 (1976) with Paul Brest, *The Supreme Court, 1975—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 2, 48-49 (1976).

40. 426 U.S. 229 (1976) (requiring discriminatory purpose in addition to discriminatory impact for an equal protection violation).



problem of constitutional inequality. Indeed, under our “color-blind” Constitution, these inequalities are legally noncognizable: they have become invisible.

Garver offers the right principle to judge this situation, although he does not apply it to the Court itself: we cannot trust an institution that does not trust itself. The Court’s failure to pursue the Second Reconstruction began with a failure of trust in itself. That failure is already evident in *Brown II*,<sup>41</sup> to which I think Garver gives too little attention. For here, just one year after the victory of *Brown*, the Court takes most of it back: remedial difficulties displaced the principle.

Garver is correct to see that we cannot speak about law in the abstract. The rule of law is like the domain of the aesthetic: it exists only insofar as it is embodied in particular artifacts. This is why his appeal to rhetoric is so attractive: to understand rhetoric, we must stick close to actual rhetorical performances. This same need to see law as an embedded practice and not just ideas—i.e., not just talk—requires that we look at remedies as well as rights. *Brown II* showed the Court to be acting as a tactically astute politician. This, however, is a confusion of roles that works against a judicial ethos of integrity. After three years of processing *Brown*, the Court actually ordered nothing; it took no responsibility for any ameliorative action. It sent the cases back to the lower courts, knowing full well that this would probably result in the denial of any relief to the particular plaintiffs. It made up a story of equitable difficulties, as if the public interest and the private interests of the plaintiffs ran in opposite directions in these cases. It set no timetables or deadlines, invoking instead “all deliberate speed.” If this did not invite resistance, it at least made resistance cognizable at the remedial phase.<sup>42</sup>

There were examples of judicial heroism in the school desegregation cases—the ethos of commitment to principle—but not in the Supreme Court.<sup>43</sup> It did not have to be this way. Again, compare *Roe*, where the Court laid out a detailed remedial scheme that gave material reality to the right to choose.<sup>44</sup> Of course, the Court was attacked viciously for drawing up a “regulatory plan”—a legislative responsibility—but if ethos involves responsibility, then the Court must not only articulate rights but also ensure their realization. When *Casey* is criticized today for undermining *Roe*, it is because the Court’s decision

---

41. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955).

42. See Paul Gewirtz, *Remedy and Resistance*, 92 YALE L.J. 585, 609-613 (1983).

43. See, e.g., JACK BASS, UNLIKELY HEROES: THE DRAMATIC STORY OF THE SOUTHERN JUDGES OF THE FIFTH CIRCUIT WHO TRANSLATED THE SUPREME COURT’S *BROWN* DECISION INTO A REVOLUTION FOR EQUALITY (1981).

44. *Roe*, 410 U.S. at 162-64.

threatens the realization of the right it purports to uphold.<sup>45</sup>

In both of these ways—articulating the principle and taking responsibility for the practice—there is much to be criticized in the Court's performance in *Brown*. The ethos of *Brown* is too political and insufficiently legal. Politics is not necessarily less principled than law. I am hardly accusing the Court of bad faith or of a failure of moral vision. Rather, there was a failure in its legal ethos. This may have been because the Court thought that the problem of race in America was beyond the capacities of law to remedy. That may even have been a correct judgment. One can't really know about such things. As Garver reminds us in his book, the measure of the excellence of a rhetorical performance is not whether in fact it does persuade.

If we address directly this contrast between a political and a legal ethos, I think we have reason to question another point in Garver's elaboration of the litigation surrounding *Brown*. He finds it an illustrative, rhetorical failure for the District of Columbia's counsel to have relied upon Justice Taney's eloquent language in *Dred Scott v. Sandford*<sup>46</sup> to support its argument that the Court is bound to the Founders' intent and is not free to amend the Constitution to accord with contemporary values.<sup>47</sup> I think this incident more complex than a rhetorical gaffe. What it suggests to me is that the judicial ethos does not map out in any simple way on to moral principle—even as compelling a moral principle as that of racial equality.

I suspect that the attorney was not appealing to the racial prejudice of the Justices or of the Founders. Rather, he was appealing to an ideal of judicial courage, i.e., to an ethos of judicial integrity. An important part of the judicial ethos involves the disappearance—the literal suppression—of the individual Justice as a subject.<sup>48</sup> The rule of law is not the rule of men, including the Justices on the Supreme Court. Integrity is a function of the opinion, which is the possession of the Court, not the individuals. One aspect of the judicial ethos is to rule against one's own interests, values, and beliefs. Holmes famously recognized this in his *Lochner* dissent,<sup>49</sup> as did the plurality in *Casey*.<sup>50</sup>

---

45. E.g., Robin L. West, *The Nature of a Right to an Abortion: A Response to Professor Brownstein's Analysis of Casey*, 45 HASTINGS L.J. 961 (1994).

46. 60 U.S. 393 (1856).

47. GARVER, *supra* note 1, at 112-18.

48. See KAHN, *THE REIGN OF LAW*, *supra* note 15, at 234-37.

49. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J. dissenting) ("I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.")

50. *Casey*, 505 U.S. at 867-68 ("An extra price will be paid by those who themselves disapprove of the decision's results when viewed outside of constitutional terms, but who nevertheless struggle to accept it, because they respect the rule of law.")

The appeal to *Dred Scott* offers a reminder of the demand for judicial integrity. Counsel tells the Court that other Justices have found themselves in very difficult situations with respect to the moral claims of black people in America. They stuck to the Constitution, leaving to the political process—ultimately the Civil War—the process of constitutional amendment. To bear the burden of the sin of *Dred Scott* is a powerful image of the judicial ethos of integrity. This is just what the conservative members of the Court say they are doing with respect to the sin of *Roe*.

The point of returning to this example of lawyering—of sticking close to legal artifacts in offering an interpretation—is to emphasize that the ethos of law is not the ethos of morality. The ethical authority of the judge does not necessarily arise from doing the right thing. Or more accurately, because we live simultaneously in different normative orders—including, the legal, the political, and the moral—there is never just one right thing to be done. Whether advancing the integrity of the judge will give us a morally better society is not a question that can be answered in the abstract. It depends what the courts do with their integrity.

We should not fetishize law, legal process, or judges. The virtues of law will not do our moral or political work for us. *Brown* got this part right. Its problem was not that it failed morally. Rather, the Court failed to utilize the possibilities of law to support its moral vision. The Court thought that its intervention was political and, in the end, paid a political price.

Often the complaint is made of Dworkin that he does not adequately distinguish law from morality. With Garver's book I had a similar worry from the other side: has he adequately distinguished legal from political ethos? I suspect there is a larger lesson here. The insistence on the role of integrity in law does link law to both morality and politics. Approaching the autonomy of law through the conceptions of integrity and ethos is necessary to understanding the character of reason in law. The difficulty is to keep sight of the autonomy of law even while law's reason seems always to be drawing on both morality and politics.

\*\*\*